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Experience vs Knowledge in Comparative Law:
Critical Notes on Pierre Legrand's 'Sensitive Epistemology'

Once an experience has become measurable and certain, it immediately loses its authority

Agamben (2007, p. 20)

[C]omparative lawyers are generally lawyers of some kind

Zweigert and Kötz (1998, p. 11)

Abstract:

This article expounds some critical reflections on Pierre Legrand's recent account of James Gordley's and James Whitman's comparative methodologies. Pushing his unconventional writing style to the limits and labelling Gordley's 'positivist' and Whitman's 'cultural' comparative law, Legrand's piece appears to be taking the first step towards a new, more sensitive phase for the comparative study of law and legal cultures. The article argues that contrary to what might be first thought, Legrand's 'sensitive epistemology' cannot act as a gateway to cultural otherness. This is because it is wholly in line with the constructivist objectification of life that characterises the study and practice of law both within and outside the comparative law dimension.

Keywords:

Experience; knowledge; comparative law

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1. Introduction

After almost two decades, Pierre Legrand recently returned to the pages of *The American Journal of Comparative Law* (AJCL) with an article which will doubtless attract much discussion in both the theory and practice of comparative law (Legrand 2017). Legrand's essay is highly controversial both in its form and content. It is 132-pages long; has no headings whatsoever; counts 400 footnotes; and is not just critical but extremely polemical. It is, at times, repetitive; yet with it, Legrand pushes his unconventional writing style to the limits. In fact, the specificity of Legrand's writing skills and the peculiarity of the article are the reasons why the AJCL's Editors decided to go ahead with its publication despite its lack of structure and book-length. As Helge Dedek (2017, p. ix) writes in his Preface to the Special Issue in question:

‘[a] Legrand text through and through, it was also obvious to us that a “blind” peer review would necessarily be unrealistic. Yet despite these difficulties, it seemed to us that we had been presented with a unique opportunity: what if we could let the clash of ideas play out in the open, rather than under the cover of anonymity in the regular peer review process, and create a platform where critic and criticized can meet, on equal footing, in open dialogue.’

It is easy to imagine that many, particularly young, scholars would not appreciate this preferential treatment extended to Legrand. Yet, the AJCL's Editors are certainly right when they say that Legrand's submission represented a valuable opportunity for comparative law scholars to reflect on what, to echo the words of Hannah Arendt (2008, p. 5), they have been doing and plan on doing. Indeed, in his piece, Legrand comes to terms with some long-debated (yet never solved) theoretical and practical issues which have always characterised the development of comparative law as both an academic discipline and juridical practice. Interestingly enough, Legrand decided to unfold what, in his view, are comparative law's problematics and strengths by comparing two methodologies of inquiry—i.e. by turning the comparative approach to legal phenomena (and life more generally) against itself. These are James Gordley 'positivist' and James Whitman's 'cultural' methodologies, as he himself calls them while criticising the former and praising the latter (Legrand 2017, p. 9). Noticeably, both Gordley and Whitman have expressed reservations about Legrand's strong opposition between the two methodologies.

Given the singularity and richness of Legrand's account, the AJCL's Editors decided to invite Gordley and Whitman to engage with it, as well as to extend the invite to a few 'scholars known for their recent outstanding work' (Werro 2017, p. viii). These are Russel A. Miller, Sheraly Munshi, and Peer Zumbansen. However, the Editors tell us that while Legrand '[c]ourageously, ... offered his manuscript to the critique of the chosen contributors, [he] decided not to read their texts. Obviously, he was therefore not in the position to respond to the criticism they expressed' (ibid.). Thus, the reader is unfortunately left with no actual debate between Legrand and his commentators.

Legrand's piece deserves our attention not only because—as has been rightly pointed out—he 'is one of the more controversial comparatists of our time' (Örücü 2007, p. 49; see also Husa

2015, p. 136; cf. Siems, 2018, pp. 140–144). Rather, it does so to the extent that, by emphasising the importance of socio-cultural and hermeneutical forms of juridical analysis and ‘convey[ing] some of the comparativist-at-law’s inexorable meandering’ (Legrand 2017, p. 129), it appears to be taking the first step towards a new, more sensitive phase for the comparative assessment of law(s) and legal culture(s). To discuss it in all its aspects would require a more extensive treatment than can be provided here. Thus, in the following pages I would like to limit myself to what I believe is the main inconsistencies of Legrand’s important contentions regarding the socio-cultural dimension of law and regulatory phenomena on the one hand, and their comparative study on the other.

In particular, I argue: A) that in advocating what I suggest to call ‘sensitive epistemology,’ Legrand’s claims have far-reaching implications that transcend the purview of scholarly discourses over comparative law’s nature, scope, and methods; B) more specifically, that Legrand’s account represents a valuable opportunity to reflect on what role experience and knowledge play in the study and practice of law generally, rather than just in comparative legal studies; C) that while Legrand is right in contending that the comparative analysis of law and legal cultures involves self-referred, other-regarding, and meaning-revealing practices, his view that experience-driven and culture-sensitive comparative analysis leads to (a non-positivist form of) knowledge blurs the *philosophical* distinction between experience and knowledge; D) that, as such, the philosophical basis on which Legrand’s views rest is inconsistent; E) that, as a result, Legrand’s ‘sensitive epistemology’ cannot act as a gateway to cultural otherness as it is wholly in line with the constructivist objectification of life that characterises the study and practice of law, both within and outside the comparative law dimension; finally, F) that Legrand’s attack on positive methods of comparison ignores, or appears to ignore, a peculiar form of legal positivism that accommodates his socially-embedded cultural hermeneutics (or culturalism)—namely, Brian Tamanaha’s socio-legal positivism.

Before going any further, it should be clarified that it is not my intention to choose between the ‘two Jameses’ or to say differently, between the ‘positivist’ and ‘cultural’ (or Husserlian and Joycean, as Legrand also labels them: 2011, p. 72) approaches to comparative inquiry. I am not interested in discussing comparative law’s ‘never-ending methodological self-doubts’ (Zumbansen 2012, p. 188), nor in surveying the academic debate on the comparative sociology of law and the concept of legal culture—there are plenty of excellent contributions to that effect already. My intent is instead much more modest, as I will limit myself to substantiating the above-listed claims, all of which, I contend, share a common core regarding the implications that the ‘experience-knowledge’ dichotomy has for an appreciation of law’s juridical component (Siliquini-Cinelli 2018, 2020¹). The fact that this antithesis has not received the attention it deserves in comparative law literature is all the more surprising considering the discipline’s ‘desire to be academically sophisticated’ (Reimann 2012, p. 32).

In his acclaimed introductory text to the comparative law world and its method(s), Geoffrey Samuel (2014, p. 120) writes that:

Legrand is not arguing that one does not study the court structure or the institutional system as such; what is to be rejected is the idea that such structures can transcend a cultural mentality to become some kind of transcultural science.

Using Samuel’s reconstruction as a starting point while also drawing from Legrand’s own body of work and AJCL article, my aim is to show that what Legrand misses is that knowledge is by definition impersonal, and thus, a-cultural. True, as Jennifer Nagel (2014, p. 3) has said, ‘[k]nowledge demands some kind of access to a fact on the part of some living subject’.

¹ The theme of what distinguishes experience from knowledge, both within and outside law, is a complex one. In addition to the articles just mentioned, I am elaborating at length on it in a new monograph, currently under contract with Edinburgh University Press.

Asserting that knowledge cannot but be experience-based simply means, however, that it is factually grounded, or inseparable from the subject's a priori facticity. This should not distract us from appreciating that, philosophically, the cognising subject is just an (active: Polanyi 2015, p. xxvii) ontic container of a metaphysical end-result of intellectual processes of ontological abstraction that objectify life. Consequently, knowledge's structuralising properties are incompatible with Legrand's call for a personal (self-defining) and culturally-oriented (other-regarding) act of comparison. This explains why advocating, as Legrand does, 'the redemption of epistemology within comparative law' (2017, p. 20) while simultaneously stressing the experiential nature of the comparatist's efforts is, simply put, an ontological oxymoron.. Therefore, despite his aim to overcome the scienticism which informs positivist approaches to (comparative) law and analysis ought to be welcome (ibid. p. 77), Legrand's 'sensitive epistemology' ultimately replicates within comparative law discourse the metaphysical character of Western thinking's desire to combine the universal with the particular (recently, see e.g. Wolcher 2017, p. 3)—i.e. the very source of modern scientific attitudes towards life and positivist mechanisms of knowledge production he challenges. As will be shown, the likeness between Legrand's vision of how legal sensibilities should be approached, and Tamanaha's culture-accommodating legal positivism, is testament to this.

This article is structured as follows. The second section outlines the basic thrust of Legrand's view. The third one sets out some critical (i.e. philosophical) reflections on it, and compares his and Tamanaha's accounts. Concluding remarks follow.

2. Legrand's Vision for Comparative Law

Despite his unconventional mode of exposition, the main thrust of Legrand's argument is not difficult to grasp and can be summarised by reference to some key-passages from his AJCL article. First, Legrand (2017, p. 21) tells us that

my [his] exposition defends the enduring need for comparative law to be reflexively and critically attentive to its epistemic commitments, to the question of knowledge in comparative discourse, to what must be valued as a matter of comparative knowledge, and to the discursive forms comparative knowledge can adopt.²

Then, right after the middle of his contribution, Legrand clarifies what ought to be rejected for comparative law to lead to what might be called a 'sensitive epistemology' capable of appreciating the contextuality of legal orders as culture-dependent constructs (ibid., p. 69, 102).³ 'The transposition I critique,' Legrand writes,

² See also Legrand (2015, p. 449), where Legrand writes that his (negative) comparative law 'wants to fashion an appropriate interpretive matrix allowing for the development of the relevant knowledge that has been suppressed or neglected by traditional [i.e. positivist and orthodox] "comparative law".' See also the next footnote, and Section 3.1.

³ See also Legrand (1988, p. 790): 'Comparative law, like the other perspectives alluded to, serves to highlight the accidental and contingent character of many rules and practices.' Legrand (2011, p. 68) defines epistemology as '... the conditions — historical, political, social, and otherwise — under which foreign law is made into knowledge, the practices marshalled to obtain that which comparatists call 'knowledge' of foreign law.'

involves an “improper extension of [scientism] to domains of cultural activity to which it does not and cannot apply.” (If the science envy I discern does indeed inform the establishment of knowledge by comparative law's *doxa*, this means that the comparativist's longing for the identification of “what the law is” finds itself being trumped by another form of metaphysical pathos, such as the *drive* to science, which would deidentify the “is-ness” of the law, cast it as something that it is not, and thus *redeem* it-this theotropism however assuming a certain view of science now regarded in many circles as so archaic, “a spellbound backwash,” as to prove epistemically indefensible. (ibid., p. 77; emphasis in original)

Having paved the way for the core of his claim, a little later Legrand goes on and asserts:

I maintain that the alleged outside-culture is, in fact, located so that it reveals a very intimate relation with law and cannot therefore plausibly be regarded as being external to it. It is sutured to law. While culture can still be distinguished from law, not unlike the way in which the canvas can be differentiated from the painting, it is not outside of it any more than the canvas is outside the painting. *Culture is not an exterior entity to law*, no matter how indigestible this fact may appear to positivists. Observe that I am not suggesting that culture happens instead of law. It is not that law finds itself being displaced, lost, or dissolved. Within my proposed configuration, there remains ample room for statutes and textbooks, for judicial decisions and law-review articles, except that these texts are to be seen to exist as culture. *Law-texts are culture speaking legally*. It is not, then, that I am seeking to do to law what positivists have been doing to culture, that is, to efface it from the comparative scene. Indeed, it would be counter-productive to implement

positivism's dogmatism in reverse. I am not seeking to flip the coin, but to change the coinage. My goal therefore is not to jettison statutes and judicial decisions within comparative research, but to approach them afresh, to come to them *obliquely*. (ibid., p. 100; emphasis in original)

The move towards comparative law's radically new 'epistemic response and responsibility' (ibid., p. 21; see also ibid., p. 13) would fail, however, if the 'comparativist-at-law,' as Legrand repeatedly calls her, would not internalise the experiential nature of the task in question. Drawing from Martin Heidegger, Legrand thus claims 'that ultimately, the only approach to the event of the foreign law-text is one based on experience and experimentation (interestingly, the French language has a single word, '*expérience*,' to embrace both terms), one thus featuring nomadic errancy' (ibid., p. 12; see also ibid. pp. 115–116; *id.* 2002, pp. 32–33).

This is what legal positivism's sterile techniques of 'epistemic governance' (ibid., p. 96; see also *id.* 2015) void—namely, the structural relationship between 'the phenomenological dimension of meaningful experience within comparative analysis' (ibid., p. 17) and the cultural substratum of normative orders (Legrand 1995, p. 266). Indeed, legal positivism's ethical and political (Legrand 2017, pp. 8, 21) blindness towards culture (as epitomised by Gordley's 'Cartesianism'⁴ and 'analytical compulsions,'⁵ Zweigert and Kötz's functionalist '*praesumptio similitudinis*'⁶ and '*école de vérité*,'⁷ or Alan Watson's 'most impoverished explanation of interactions across legal systems,'⁸ to name just a few) makes us forget that comparative law is

⁴ Ibid., p. 66.

⁵ Ibid., p. 67.

⁶ Legrand (2003, p. 246).

⁷ Legrand (2017, p. 44).

⁸ Legrand (1997, p. 112).

but an Agambenian zone on indistinction, or interaction, between the comparatist's cultural self and the cultural otherness of the encountered object of study. This explains why 'the discordance separating Whitman's and Gordley's avowed scholarly projects [is] irresoluble: *a comparativist reading foreign law culturally cannot not affirm otherness, while a comparativist reading foreign law positivistically cannot not deny it.*' (ibid., p. 21; emphasis in original). What Gordley's 'dubious metaphysics' (ibid., p. 69) conceals, then, is that comparative law's

aim must be to try to define the frame of perception and understanding of a legal community so as to explicate how a community thinks about the law and why it thinks about the law in the way it does. The comparatist must, therefore, focus on the cognitive structure of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure. (Legrand 1996, p. 60)

Comparison, then, requires an open-minded attitude towards 'the legal *mentalité* (the collective mental programme), or the interiorised legal culture, within a given legal system' (ibid.; see also *id.* 2017, p. 22, where Legrand speaks of 'shared mental programmes'; and *id.* 1995, pp. 272–273; *id.* 2002, p. 21). As Legrand (2001, p. 68) himself pointed out while concluding his well-known article on legal transplants, indeed,

[c]omparative legal studies can further one's understanding of other peoples by shedding light on how they understand their law. But, unless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that the law

lives in a profound way within a culture-specific—and therefore contingent—discourse, comparison rapidly becomes a pointless venture.⁹

Legrand's 'politics of understanding' (2003, p. 250) thus calls 'for a protocol of action foregrounding an interpellative and interlocutory ethics upon which all other structures organizing the relation between self and other – and between self-in-the-law and other-in-the-law – must rest' (ibid.)¹⁰ Yet, this Levinasian (ibid., p. 264) way of doing comparison cannot be reduced to a mere act of experiential dwelling, or a Heideggerian thinking that thinks—i.e. a thinking that frees itself from its 'technical interpretation' (Heidegger 2008b, p. 218). This clearly emerges when, without renouncing to fighting the 'authoritative ideal of knowledge and truth' (Legrand 2003, p. 248) put forward by those 'monistic models' (ibid., p. 257) which have been characterising the Western tradition since its inception and have then reached their apex within orthodox schools of positivist comparison, Legrand assigns a primary role to schemes of intelligibility in the comparative enterprise. As he himself writes,

[b]ecause culture functions as an ongoing integrative process, what one encounters by way of alternative experience tends to be intelligibilized against the background of existing patterns within which it is ultimately absorbed even at the cost of a measure of dissonance reduction. (Legrand 2017, p. 28)

⁹ See also ibid., p. 128, where it is affirmed that 'comparative law must militantly advocate an approach allowing for the recognition and respect of the radical singularity of the other's law that is different.' See also ibid., pp. 83, 90, 102.

¹⁰ See also Legrand (2017, p. 90): 'Ultimately, the comparativist-at-law aims to make sense of foreign law, to transform the otherness concealed within law-texts into knowledge through interpretation, to translate scenes of non-knowledge into relevant information.'

The structural link between every act of comparison's experiential and meaning-revealing (Legrand 2011, p. 88; i.e. self-dependant, other-encountering and ultimately, self-defining¹¹) disposition, dependency over conceptual re-organisation and re-orientations, and achievement of epistemological objectives could not be affirmed with more force. 'While law cannot exist beyond interpretation (in order to make sense, law depends on an interpretive experience), interpretation cannot exist beyond world,' Legrand (2017, p. 72) observes. 'Every comparativist's thematic projection,' he continues,

involves a correlative projection of himself along the investigative path leading to his ends. Although an interpreter might wish to be somewhere other than where he is, every interpreter is emplaced, somewhere. And, inevitably, every interpreter's perspective is announced or framed by the linguistic and conceptual resources that the culture within which he has been socialized, and that he has incorporated, and whence he operates, has put at his disposal. (ibid., p. 80)

Only by uncovering and deactivating legal positivists' 'impermeability to the range of existential vagaries liable to afflict interpretation' (ibid., p. 5) a new phase of self-reflexive awareness for comparative law may ultimately commence in which comparatists will be able to account adequately for the phenomenal character of comparison. Indeed, to Legrand 'positivists censor the world of culture [to the extent that] positivism is (and wants to be) radically bereft of all forms of cultural edification' (ibid., p. 8). In particular, 'because

¹¹ Legrand (2017, p. 32): '...the foreign law one is shaping is to be understood as an extensibility of oneself in the sense that the comparison goes in a circle, which starts with the self and ends with the self'. See also *id.* (2011, p. 70): 'In fact, through the selfing of the other, the foreign inevitably partakes in the very production or constitution of the self (think of how *your* gaze fashions *my* shame...)'.

positivism is in search of knowledge that is technically utilizable, culture ... simply does not register on the professional scale' (ibid., p. 9). From this it follows that:

Positivism posits the deposition and the disposition of culture. And closure is the condition of positivism. Without such fixation of boundaries, there could be no positivism. But what is necessary for the system to behold is also fictitious: the discarded alternative continues to work at the margins and re-emerges with the inevitability characteristic of the return of the repressed. (ibid.)

Due to their 'stationary intellectual fashion' (ibid., p. 90), legal positivists are unable to appreciate that 'law is performance ... not a "being" but a "doing" (Legrand 2003, p. 248). This simply means that legal positivism is incapable of appreciating that the (legal) culture that lies beneath (the) law, that informs its regulatory claims and operativity, 'is ever-becoming—and the comparativist-at-law's formulations of it, although always already situated, are ever-mobile' (Legrand 2017, p. 28). This is why, Legrand maintains, Whitman's way of doing comparison ought to be preferred over that of Gordley: because '[i]t expresses a distrust in positing and in positivity and in positivists and in the positivist *Zeitgeist*, which it *ex-poses* as the most determining factor suppressing the phenomenological dimension of meaningful experience within comparative analysis' (ibid., p. 17).

In order to allow his readers to comprehend why the symbiotic relationship between law's and the comparatist's existential mobility expresses, as the early Heidegger would call it, an immanent ontological condition of facticity, Legrand even substantiates his claims via reference to his 'own life experience' (Legrand 2003, p. 244). In fact, and as set out, the extent to which personal experiences shape the comparatist's work becomes one of the major points of Legrand's critique of Gordley's (positivist) comparisons: despite his intention to grasp and

analyse the ‘law-as-it-is,’ (Legrand 2017, p. 71) or law’s ‘is-ness’ (ibid.; see also ibid., pp. 76, 81–83, 98, and 104–106), Gordley fails to understand that, ultimately, he ‘cannot escape a description of French law *as it seems to him in terms of his capacities and practices*’ (ibid., p. 79; emphasis in original).

Thus, ‘as he encounters foreign law, Gordley fabricates it’ (ibid., p. 83; see also *id.* 2019, pp. 302ff). Consequently, Legrand concludes that,

‘What Gordley will eventually style (whether expressly or not) as “The French Law of Privacy,” for instance, would thus more appropriately deserve to be entitled “My Very Best Interpretation of the French Law of Privacy as I Sit in My New Orleans Study at This Stage in My Career and in My Life, in the Light of My Overall Cultural and Legal Education Including My Socialization into Comparative Law and My Linguistic Competence in French, on the Basis of My General Experience as a Comparativist-at-Law and of My Familiarity With French Law and French Legal Culture in Particular, Given What I Wanted to Establish, by Reference to the Materials I Came Across in Paris in the Time I Could Spend There, Regarding the Texts I Decided to Use, in Connection With the Arguments I Chose to Mobilize, With Respect to the Evidence I Elected to Retain, Apropos of the Quotations I Opted to Feature, and Concerning the Words I Preferred to Deploy in Order to Account for What Inevitably Remains Less Than the Whole.”’ (ibid., p. 87)

3. The Philosophical Problem of Legrand's 'Sensitive Epistemology'

3.1 Experience is not Knowledge

At this stage, it might be objected, with good reason, that what Legrand claims (and, of course, the way he claims it) has no implications whatsoever for our understanding of juristic practice and its teaching. At the end of the day, as Harold Gutteridge (1953: 23) noted, '[a] busy practising lawyer cannot, as a rule, be expected to pay much heed to other systems of law.'¹² Legrand (2007, p. 222) argues similarly: '[t]he vocation of comparative work about law is intrinsically scholastic and its agenda is, therefore, incongruent with that of practitioners or lawmakers seeking to elicit epigrammic answers from foreign law.'

Yet the opposite should be obvious. Not only, indeed, comparative lawyers are ultimately lawyers, as Zweigert and Kötz correctly reminded us. Not only, as comparatists know full well, how we theorise and operationalise the comparative study of normative orders and cultures has meaningful repercussions on legal education's development (Yntema 1958, p. 499; Reimann 2002; Samuel 2002, p. 35; Örüçü 2004; *id.* 2007, p. 54; Husa, 2015, p. 71) and beyond.¹³ Above

¹² Thus as Siems (2018, p. 401) has more recently observed, comparative law 'is often disregarded by legal practice.'

¹³ Legrand (2017, p. 128):

'... [S]ince one's conception of comparison has a direct impact on the kind of knowledge that will be apprehended as "legally" relevant (or as "legally" insignificant) and therefore on what voice the other law will be allowed and thus on the very *presencing* of the other-in-the-law, I consider that comparative law must militantly advocate an approach allowing for the recognition and respect of the radical singularity of the other's law that is different.'

all, the necessity to reflect on what comparative law can offer to the academic debate on juristic practice and its teaching has to do with the fact that Legrand emphasises the socio-cultural dimension of law as a regulatory phenomenon, while also rejecting the anti-theoretical approaches to comparison *a la* Ronald Dworkin which see legal reasoning as an art rather than a science (Samuel 2014, pp. 19–20).

This is important. The 1900 Paris Congress, which is usually considered to be the ‘mythical,’ (Frankenberg 2016, p. 5) foundational moment of modern comparative law as a (scientific¹⁴) field of study revolving around ‘the juxtaposing, contrasting and comparing of legal systems or parts thereof with the aim of finding similarities and differences’ (Örücü 2007, p. 44). It was there that legal comparatists set forth a call for scientism—i.e. a ‘continuing belief in the science of law as both a method for unbiased analysis and the discovery of the classifiable nature of all legal systems’ (Rosen 2003, p. 493). Some towering figures in the comparative law dimension, such as Hessel E Yntema (1958, p. 467), Zweigert and Kötz (1998, p. 15), and Rodolfo Sacco (1991, p. 8) have explicitly advocated a scientific approach to the discipline (i.e. comparative law as comparative legal science). Other leading commentators, such as Jaakko Husa (2003, p. 69), have come to use the terms ‘comparative law’ and ‘comparative legal science’ as synonymous. Other prominent thinkers, such as Jerome Hall (1963), Esin Örücü (2007), Annelise Riles (2006, p. 775), Catherine Valcke (2009, p. 99), William Twining (2005; 2009, pp. 244–265), Frederick Schauer (2012, p. 212), Anne Meuwese and Mila Versteeg (2012, p. 230), Julie De Cornick (2012, p. 258), Mathias Reimann (2012, pp.25–27), and Samuel (2014, p. 23)¹⁵ have stressed that comparative analysis ought to rely on data and

¹⁴ Örücü (2007, p. 44): ‘Comparative law is a science of knowledge with its own separate sphere; an independent science, producing theoretical distillate. [It is] the ‘critical method of legal science.’

¹⁵ See also *ibid.*, pp. 114, 161, where Samuel outlines why the *natural* sciences paradigms, with their focus on laws of causality, cannot be of assistance to comparative lawyers; and See also *id.* (2004; 2008).

thus, make use of the social sciences' empirical methods of discovery and knowledge production (Nelken 2016, p. 390). Still others who conceive of law as a science and of comparative law 'as the academic study of legal systems' (Cashin Ritaine 2008, p. 11), tell us that the comparison of laws is but an engineering activity. Under this light, the comparatist/engineer 'must have a pragmatic creative approach to a factual situation whilst applying basic scientific rules' (ibid., p. 19).

Claiming that cross-cultural translation is inherently problematic,¹⁶ Legrand has always dismissed any *methodological* moves in favour of a hermeneutical, culturally-oriented act of comparison capable of embracing non-scientific *modes* of discovery (Legrand 2017, pp. 12, 22)¹⁷ which appreciate the deep contextuality (or Heideggerian being-in-*there*; but see Legrand

¹⁶ A recurring statement in Legrand's (2017, p. 5) writings is that

'... positivists adhere to a brand of writing purporting to deploy itself in a largely unproblematic and unsituated mode so that, showing impermeability to the range of existential vagaries liable to afflict interpretation, it can be mobilized to foster exact (that is, non-perspectival or non-horizoned) statements about "what the law is".'

See also *id.* (2018, pp. 6, 17; 2011, p. 74).

¹⁷See also *ibid.*, pp. 12, 17; and *id.* (2006, p. 369):

'I seek, as comparatist-at-law, affirmatively to encourage contrarian discourse in the face of a totalitarian rationality established by established comparative legal studies which, while claiming to pursue the ideal of impartiality by reducing differences in the lifeworld of the law to calculative and instrumental unity, effectively privileges a situated standpoint — that favouring logocentrism and regulation, that pursuing methodological systematisation and scientificisation, that seeking to elicit through ever-increasing technological standardisation of law the kind of epigrammatic

2006, pp. 439–444) of legal orders and regulatory mechanisms. Further, and as will be seen in the next Section, Legrand firmly believes that the comparative enterprise is, and cannot but be, ultimately unsuccessful¹⁸ (something which would not be possible if comparative law were a science). This is why Legrand repeatedly criticises the idea of an ethically sterile and politically functionalist (comparative) legal science and favours an understanding of comparative law as a philosophical journey rather than a method-dependent inquiry (Legrand 2009a, pp. 59–63; see also *id.* 1988; 1995, p. 264).¹⁹ Not coincidentally, Legrand also points at the inconsistencies

answers from foreign laws valued by practitioners and lawmakers — which it allows to project as universal’.

See also *id.* (2009b, p. 31):

‘En France ... non seulement le droit est-il re-formulé en tant que “science”, mais il est fait “science d’État”. Le droit, c’est une *Staatswissenschaft* – une forme prodigieuse de violence symbolique. Il faut échapper aux agrégations qui confinent les études juridiques comparatives à l’illégalité et, par-delà ce scandale épistémologique, revendiquer *le droit à la comparaison*.’

¹⁸ Legrand (2018, p. 21): ‘Foreign law ultimately eludes the semantic reach of every effort at exhaustive enunciation: it exceeds every thorough re-presentation, it lies beyond complete articulability, it escapes the harness of integral interpretation.’ However, Legrand (2011, p. 167), also clarifies that

‘None of these observations ... is to claim that there is deadlock, that no judgment is possible or worthy. As I have indicated above, to appreciate other laws, to accept the differend across laws, and to recognize and respect the other’s law, is not to condemn oneself to normative standstill.’

¹⁹ This also reflects Legrand’s broader categorisation of himself as a scholar. See *id.* (2011, p. 6): ‘I do not direct anything or anyone. ... I have no tendency to promote any intempestive certainty (like neutrality), intemperate dogma (like objectivity) or imperious creed (like truth) — nothing from the epistemic bargain basement.’

of pretentious claims regarding science's objectivity and detachment from contextual (i.e., historical, political, social, etc.) conditions of development (Legrand 2017, pp. 77–78; *id.* 2011, pp. 104–105). On the other hand, though, and as mentioned, Legrand rejects anti-theoretical approaches to comparison as a way to show us comparative law's experience-driven and culture-attentive epistemological path. As he writes,

‘... a focus on legal culture changes the parameters governing comparative research [because] the argument in favor of a culturalist approach is not merely theoretical, but carries the most practical ramifications in as much as it leads to the construction of a different knowledge about foreign law and, ultimately, conduces to the formulation of a different foreign law.’ (2017, p. 25)

Here is where, I submit, Legrand's attempt to replace (legal) positivism's abstract, universal, and equalising knowledge (*adequatio rei et intellectus*) with a culture-based local knowledge²⁰ obfuscates the philosophical distinction between experience and knowledge and the relevance it has for an appreciation of law's juridical component. The emphasis I place on the philosophical nature of the inconsistencies which underlie Legrand's account is, of course, not

²⁰ Legrand (2006, p. 367):

‘In appreciation of the fact that comparative analysis of law is a serious political act — does it not ascertain the other for me and inscribe him, to the point where what I write becomes an aspect of the other's legal identity? — comparatists must resist the powerful drive towards the construction of abstract commonalities ... and acknowledge the ineliminability of difference which, as witnesses, it becomes their responsibility to characterise, articulate, and justify. The goal must be to redeem local knowledge, best described in terms of its plasticity, pliability, diversity, and adaptability.’

accidental as it has to do with the heavy use that Legrand makes of philosophical—particularly continental—thinking to substantiate his claims. Unfortunately, the philosophical discrepancy of Legrand’s thought on this point undermines the accuracy of his otherwise important analysis on the past, present, and future of comparative law. This clearly emerges when Legrand stresses the unavoidable limits of any act of comparison as deriving from its experiential nature²¹ while at the same time pointing at the discipline’s epistemic commitments. This reconstruction not only turns ontological issues into epistemological ones, but ultimately forgets that knowledge’s authority derives from it being neither incomplete nor imperfect (reality as *certitudo*).²²

As I have showed elsewhere (Siliquini-Cinelli, 2018, 2020), knowledge is a metaphysical end-result of intellectual processes of ontological abstraction that transcend life’s finitude by objectifying beings *as* phenomena (and thus, human existence and relations). To put it differently, knowledge phenomenologically equalises the targets of its reach for regulative and structuralising purposes, thus emptying their constituting properties as well as the

²¹ Legrand (2017, p. 107; emphasis in original):

‘In the end, the comparativist cannot get *there*, from the self to the other, two unbridgeable islands, which means that he can never fully deploy foreign law’s enigma, that there is a residual element within the singularity of foreign law that is destined to remain a secret for him. At best, the comparativist can position himself on the *verge* of foreign law—a brinkmanship that makes comparativism-at-law an inherently agonistic practice.’

See also *ibid.*, p. 116; *id.* (2015, p. 449); *id.*, (2011, pp. 68–69), where Legrand uses again the term ‘practice’ to define what comparative law is and how it can achieve its epistemic objectives. In so doing, Legrand not only embraces the Humanist belief that practice leads to knowledge, but produces within the comparative law dimension the paradox that underpins cognitivist legal theories, all of which ‘agree on the central role of *practice* for legal *knowledge*’: Pavlakos (2007, p. 3; emphasis added).

²² ‘Knowledge, which is power, knows no obstacles,’ wrote Theodor Adorno and Max Horkheimer (2007, p. 4), two thinkers Legrand is familiar with.

unpredictability of their interaction. This also explains why, despite being ‘organized and articulated,’ (Cassirer 1944, p. 208) experience is unique and imperfect,²³ while knowledge looks for certainty and truth through a logic that prompts objectification, and thus, nullification.

In this sense, I submit that the distinction between knowledge as such (or *regular, ordinary* knowledge) and *scientific* knowledge should not be over-emphasised²⁴ as both are animated by the operativity of a procedural truth founded on reason’s methodological effectuality—i.e. in both instances the cognitive process is propelled by a calculating reason whose effectuality is expressed through a metaphysical *act of measurement*. What distinguishes the scientific (i.e. more reliable; see e.g. Wootton 2016, pp. 1, 51, 393) production of knowledge from other epistemological enterprises lies in the systematisation of the various end-results (theoretical knowledge) as well as in the further sophistication of the methodologies deployed by the analyst, among which stand the ‘systematic observation and experimentation, inductive and deductive reasoning, and the formation and testing of hypotheses and theories’ (Andersen and Hepburn 2018; unpaged) (experimental knowledge). Thus, David Wootton (2016, pp. 527, 539) correctly observes that ‘scientific enquiry is path-dependent.’ This is probably why Hans-George Gadamer famously held that science voids the ‘inner historicity of experience’ (Gadamer 2013, p. 355).²⁵

By ‘act of measurement’ I refer to the seed of the Western metaphysical tradition: the Promethean myth. As magisterially showed by Emanuele Severino (1989, pp. 27–31, 179–207), indeed, Prometheus is the god that knows everything in advance (*pro-mathḗs*) and whose

²³ As the quote by Agamben which opens this contribution highlights.

²⁴ The very noun ‘science,’ we too often forget, derives from the Latin ‘*scire*,’ meaning ‘to know;’ and the corresponding term for ‘knowledge’ in Latin is ‘*scientia*.’

²⁵ Even though, it should be noted, Gadamer identifies a similar phenomenon within everyday experience as well. See *ibid.*, p. 359.

thinking moves on a rectilinear plane on which all that exists is effectually commensured (*pánt' epistathmōmenos*).²⁶ This also confirms the regulatory—and thus, never merely descriptive—character of knowledge over life. *Epistathmōmenos* (meaning ‘to measure’ and which is the ‘verbal mode through which *epistēmē* presents itself’; *ibid.*, p. 28; my translation) derives from the substantive *státhmē*, which was the rope used to measure and work stone and wood in Ancient Greece and which means ‘norm’ or ‘rule’ (*ibid.*; my translation).

After it had been established by Aeschylus, who Severino calls the founder of reason, knowledge’s constructivist approach to life was further developed by Plato’s geometrical-mathematical vision of nature (see e.g. *Meno*, 81^{b-d}; cf. Jaeger 1986, pp. 96, 169; *id.* 1986b, pp. 228, 241; Popper 2011, pp. 190, 561–569) and Aristotle’s scientification and technologisation of experience (see e.g. *Metaphysics*, 980^a–982^b, 1027^a20, 1029^b1–12; *Post. Anal.*, II 99^b15–100^b; see also Colli 1979, pp. 213–217; Bronstein 2016, pp. 20, 61, 127, Ch 13; cf. Duke 2019, pp. 22–23, 67–68, 111).

The movement from the understanding of teaching and learning as experiential apprehending to (scientific) knowing which originated within the metaphysical and logical thinking promoted ‘in the ambit of the administration of the Platonic-Aristotelian schools’ (Heidegger 2014, p. 153) had important repercussions on the development of the Western tradition, including that of its jurisprudential branch. As is well known, indeed, Aristotle believed that only scientific knowledge is capable of being passed on to others, whereas what is apprehended through experience, cannot (*Metaphysics*, 981^a30–981^b9, 1029^b3–8; *Post. Anal.*; Cf. *Nicomachean Ethics*, 1139^b25). This view—in conjunction with the structuring of thinking and language that Stoicism brought to Rome (but cf. Gordley 2013, pp. 12–18)—

²⁶ Thus knowledge (*epistēmē*) and power (*dýnamis*) were for the Greeks the two elements which render the disposition of the world possible.

greatly influenced law's teaching and learning in the West to date, particularly since the Glossators' reason-oriented, scientific didactic (law as *scientia iuris*), based on Plato's diaries and Aristotle's analytical works, established itself throughout Italy and Europe (see e.g. Berman 1983, pp. 132–151; Padoa Schioppa 2007, pp. 87–98, 149; Errera 2007).

For us to comprehend this fully, attention must be paid to the role that theory and method (two subjects which, not coincidentally, legal comparatists have been increasingly discussing) play in the cognitive process. As set out by Wootton (2016, p. 348), every theory aims methodologically to construct a progressive system of knowledge—that is to say, a system in which knowledge progresses on the path which is aprioristically laid down by the theory's own procedures and terms. From this it follows that only if and when the factuality and ambiguity of life is deactivated so that it can fit the (already given) framework of intelligibility, knowledge is *produced*, i.e. beings as phenomena are assessed and apprehended.²⁷ Needless to say, conceptual reasoning plays a crucial role in the cognitive process, especially within the social sciences' spectrum of analysis (concepts as Weberian *Gedankenbild*; Baert 2005, p. 46). This is why Heidegger (2013, p. 34; emphasis added) writes that '[w]e [have come to] know rigorous thinking only as conceptual *representation*'—a standard approach in legal positivist inquiries (Tamanaha 2017, pp. 2, 30)²⁸ which Gordley (2017, p. 179) rejects.

The foregoing discussion reveals that when Legrand speaks of comparative law's 'epistemic commitments,' he is in fact suggesting that we adopt the Promethean (i.e. metaphysical)

²⁷ This has to do more with how the intellect operates than anything else: see Gilson (1964: 248ff).

²⁸ See also Raz (2009, pp. 20–21), where the author declares to follow HLA Hart and Gilbert Ryle in 'equating complete mastery of a concept with knowledge and understanding of all the necessary features of the object to which it applies.' See also (ibid., p. 55): 'An explanation of a concept involves explaining the feature through which it applies to its object or property, but also more explaining more broadly the nature of the object or property that is a concept of.'

approach to life. Yet, to be sure, some commentators might argue that Legrand seems to be aware of knowledge's detachment from life's facticity and ordering constructivism as showed by its dependency upon its own terms and procedures (or methodological effectuality). As Legrand (2017, p. 75) himself writes,

any collection of knowledge must assume, at the outset, various epistemic proclivities like an understanding of what is worthwhile (and of what is not), an appreciation of what is significant (and of what is not), and a sense of what is possible (and of what is not).

Further, it might be noted that my claim ultimately fails to appreciate Legrand's insistence over cultural difference. Indeed, I have been contending that knowledge's authoritarian instances operate through the transcendental character of metaphysics' working logic. My use of the term 'metaphysics' is Heideggerian, as by it I refer to the science that looks at beings *as* phenomena *comprehensively* (i.e. as a whole) with the aim of *systematising* them according to a *common* feature that they all share (see e.g. Heidegger 2008a, p. 106; cf. Cassirer 1955, pp. 76–77). Metaphysics, then, transcends the factual *singularity* of beings as phenomena, including human beings and relations, as a way to structure (and, thus, equalise and objectify) them in a given order of reference that may be cognitively accessed through judgment.²⁹ Now, it might be observed that Legrand's incessant fight against those political manoeuvres, aimed at reducing everything to the same put forward by some comparatists 'and other *conquérant*' (Legrand 2003, p. 304), proves my reading of his call for a sensitive 'search for meaning' (ibid., p. 261) to be misleading. If differences are affirmed, if 'comparative legal studies [must move] beyond

²⁹ Other works within the Heideggerean *corpus* could be cited as well, particularly *Being and Time*, the 1927 course on the *Basic Problems of Phenomenology*, the 1928 one on *The Metaphysical Foundations of Logic*, and the 1929/30 one on *The Fundamental Concepts of Metaphysics*.

resolute technical confidence, synaesthetic or monumental vision and *mathesis universalis*' (ibid., p. 250), it might be noted, then Legrand's project cannot be metaphysical. While sound, such criticism does not, per se, challenge my point regarding the central role that the philosophical blurring of the 'experience-knowledge' dichotomy plays in Legrand's thought. This can be further appreciated by reflecting on Legrand's critical analysis of legal positivism's technical mastery of the world, set out earlier, which is directly related to his rejection of a scientific, sterile, and ultimately universalistic attitude towards the cognitive structures which inform and shape legal orders as cultural products.

3.2 Legrand's Socio-legal Positivism

This brings me to the compatibility between Legrand's argument and Tamanaha's socio-legal positivism. Since the very beginning of his AJCL article, Legrand affirms the need for abandoning the a-cultural attitude of positivist approaches to normative phenomena. No doubt, this will take some doing as positivism has become the *doxa* (Legrand 2017, p. 4) of comparative law's method. Simply put, Legrand observes, legal positivists have no time to bother themselves with culture. This is due to the fact that

'... positivists of all hues are primarily concerned with analytics, that is, with legal technique and with the rationalization of legal technique. They foster "legal dogmatics," to transpose a German phrase, in as much as they aim to arrange the law in the form of an orderly, coherent, and systematic representation of the different rules in force, largely applying at the behest of the state. Throughout, their investigations remain squarely set on rules—on what has been posited by authorized officials as "what the law is"—and on the formulation of accounts of

these rules, whether judicial or academic, which are offered as veritistic.’ (ibid., p.

4)

Under positivism’s instrumental ‘epistemic restriction’ (ibid., p. 8), then, culture ‘has persistently been ignored on the ground that, being too liquid, culture fails the (narrow) analytic or empirical test pertaining to the question of legal epistemic legitimacy’ (ibid.). As a result, legal positivists’ mind-set can

only ever allow one to *identify* the law in force. It cannot do more, and it cannot reasonably be expected to do more. When it comes to foreign law, positivism is thus seen to behave in stationary intellectual fashion. While it harbors detective value, it lacks epistemic valency. (ibid., p. 90)

Now, leaving aside the fact that if legal positivism merely *identifies* foreign laws, it cannot *fabricate* them (cf. Siliquini-Cinelli 2019),³⁰ what is worth noting is that the openness towards culture which informs Tamanaha’s (2017) realistic socio-legal positivism *appears* to contradict Legrand’s reconstruction.

Not only, indeed, Tamanaha sets himself apart from those positivists that lie at the centre of Legrand’s criticism, such as Hart and Raz (Legrand 2017, p. 4; Tamanaha 2017, pp. 67–68, 150;

³⁰ This for the simple reason that, being creative and meaningful as it is, the act of fabrication (*tékhnē*) is incompatible with any form of ‘stationary intellectual fashion’, as Legrand affirms in the last quote cited. To identify, say, the Australian law of contract, or any given norm of it, I only have to locate its sources. A task which digital databases make rather easy to carry out. Fabrication plays a role at a later stage of my research, when these sources and/or their (social, political, economic, cultural) constituents have selected, assessed, and operationalised. Legrand (1995, p. 266) seems to be aware of this when noting that ‘to observe an object (such as a legal tradition) is to constitute that object.’

id. 2001a, pp. 133–170),³¹ but both Legrand (2003, p. 244) and Tamanaha (2000; 2001a, p. 171–205; 2017, Ch 3) offer a non-essentialist account of legal culture and pluralism. Furthermore, Legrand’s view regarding comparative law’s purpose and belief that foreign law is ultimately inaccessible because it can never be fully grasped, and thus, defined, via analytical (i.e. scientific) means present a striking similarity with the open-ended conception of law which lies at the core of Tamanaha’s pluralistic account. Legrand writes:

The concentration on rules has a deleterious effect on students, for it instils in them an intolerance for other forms of learning which they regard as lying outside the parameters of legal analysis and as *unrealistic* ... I prefer a view stressing that ... [t]he law derives from historical experience. So do the forms that the law embraces. Legal practices are not simple acts of accumulation and acquisition that would have taken place over the years or centuries. It would be absurdly reductionist to see legal practices as the mere formulation of rules. What accretion of elements one sees is supported by impressive ideological formations. The law, in its many manifestations, is an incorporative cultural form. Just as culture is a source of identity, legal practices are a source of identity. They encode experiences. To my mind, legal practices are very much a reflection of a given culture and of a given legal *mentalité* (in the sense of the interiorised culture). They reveal an implicit structure of attitude and reference, or a way of experiencing legal order. (Legrand 1995, pp. 265–266; see also *id.* 2005, p. 707)

³¹ Of Hartian legal positivism, however, Tamanaha (2001b, p. 32) ‘retain[s] its core insights’. See also *id.* (2001a, pp. 133, 155).

Similarly, according to Tamanaha (2001a, pp. 169; see also *ibid.* pp. 5, 149, 194, and 197; 2017: Ch 3), law is ‘whatever people identify and treat through their social practices as law (or *droit, retch*, etc.).’ And indeed, likewise Legrand’s ‘critical comparativism’ (Legrand 1995, p. 263), Tamanaha socio-legal positivism places social practices at the centre of intellectual considerations. More specifically,

it presupposes very little about law, leaving that open to conventional identification, and subsequent conceptual analysis and empirical study. Instead of dictating what law is, it asks how groups of people talk about law. Instead of assuming what law does, it examines what people do with law. It creates a framework for the identification of law, accepting that there may be more than one phenomenon that goes by the name of law, then leaves the rest to be filled in by actually existing social practices. If law is indeed a human social creation, only a flexible, open approach can capture the myriad forms and manifestations that law(s) take(s). (2001b, p. 21)

The fact that both Legrand and Tamanaha advocate a *realistic* analysis of law and legal cultures confirms the similarity of their reflections. True, Tamanaha’s theory denies the analytical accuracy of the Mirror Thesis, according to which ‘law is a reflection—a mirror—of society’ (*ibid.*, p. 1; see also *id.* 2001a: Ch 5). Yet, Tamanaha moves away from the Mirror Thesis only to set his account apart from sterile (or a-cultural, as Legrand would call them) elaborations which conceal legal development’s dependency upon transplantation phenomena and intrusive power dynamics.

In any case, Legrand appears to be aware of the resemblance between his account and that of Tamanaha. Otherwise, meticulous as he is when he comes to referencing, he would have not

quoted, towards the middle of his AJCL article, one of the key-passages of the latter's scholarship on the relationship between law and culture. 'The structural and inherent enmeshment of law and world,' we read, 'means that 'law is thoroughly a cultural construct' so that culture simply cannot stand independently over and against the law as something with which the legal analyst could plausibly maintain but an estranged acquaintance in his quest for law's meaning' (Legrand 2017, p. 69, quoting Tamanaha's book, *Realistic Socio-legal Theory*, p. 128). Given the importance of his return to the AJCL's pages and the profundity of his critique of the positivist stance, it is a real pity that Legrand does not engage further with Tamanaha's socio-legal positivist account. Or, perhaps, it reveals more than what might be thought at first glance.

4. Conclusion

Legrand's 'negative comparative law' assumes the form of an '*undisciplined* gesture' (Legrand 2003, p. 242; emphasis in original), or 'comparison as *caress*' (ibid., p. 311; emphasis in original) as he himself calls it drawing from Theodor Adorno's negative dialectics and Zygmunt Bauman's thought. This is composed of two a-methodological, revolutionary, interconnected, and ultimately ethical (ibid., pp. 250, 309) moments: an 'experience of discordance' (Legrand 2017, p. 132) and an 'epistemological break' (Legrand 2003, p. 265). Both events are to be actualised through the other-encountering and self-defining properties of contextual (i.e. relational: Legrand 2006, p. 370) modes of apprehending. This in turn requires a return to the origins of comparative law as an intellectual discipline.³² In this sense, opting

³² Legrand (1988, p. 789): 'Comparative law historically emerged as a reaction against the ever-increasing sterility of positive law studies and from the conviction that positive law alone no longer sufficed to give a satisfactory idea of the legal reality or of the world.'

for a comparative law that assumes the form and delicacy of a caress serves to deactivate the ‘violent enterprise’ (ibid., p. 367) through which legal positivism’s ‘specification of “sameness”’ (ibid.) is achieved—i.e. by ‘artificially exclud[ing] the epistemological dimensions of the law ... from the analytical framework’ (ibid.).

Legrand is right in contending that the comparative analysis of law and legal cultures involves self-referred, other-revealing, and meaning-uncovering practices. However, his overall account blurs not only the philosophical distinction between experience and knowledge. Above all, it obfuscates the role that such distinction has for the comprehension of what the comparative appreciation of regulatory phenomena ultimately entails.

That this has far-reaching implications which transcend the comparative law dimension should be obvious. Not coincidentally, Legrand aptly observes that the decisions we make when approaching, categorising, and making use of comparative law have multiple repercussions which extend well beyond the discipline’s purview. ‘Many of the theoretical issues at stake are urgent,’ (Legrand 2017 p. 132) he aptly writes. This is because

‘... one’s conception of comparison has a direct impact on the kind of knowledge that will be apprehended as “legally” relevant (or as “legally” insignificant) and therefore on what voice the other law will be allowed and thus on the very *presencing* of the other-in-the-law.’ (ibid., p. 128; see also ibid., p. 83).³³

From this it follows that ‘the comparative dynamics between self and other conceal capital issues for human existence, for collective life, and indeed for the future of the planet’ (ibid.). Legrand’s point can be proved by using it against itself, i.e. by showing why the voiding of the

³³ ‘To compare is to control,’ writes Giovanni Sartori (2011, p. 15; see also ibid., p. 52).

‘experience-knowledge’ antithesis which characterises Legrand’s thought has major consequences for the understanding of what law’s juridical component and its teaching are and entail. Indeed, either law is a science that transcends of humans’ finitude and uniqueness,³⁴ or it is a matter of epistemically-free experience that cannot do without it.

Regrettably, Legrand is not the only comparatist not to have paid attention to the philosophical relevance of the ‘experience-knowledge’ dichotomy in (comparative) legal education and practice. In the (seemingly endless) literature introducing, outlining, and discussing the nature, methods, aims, strengths, and flaws of the comparative study of law and legal cultures, an analysis of what distinguishes experience from knowledge does not appear. In fact, the reader is presented with a great deal of accounts in which the terms are used interchangeably. True, scholars have been spending considerable effort in showing the relevance of a contextual approach to science and scientific method(s) of inquiry within the comparative law dimension. In so doing, however, they also distinguish between ordinary and scientific knowledge, in so obfuscating what renders knowledge such.

Unfortunately, the voiding of the philosophical distinction between experience and knowledge does not affect comparative law only. It is, rather, a key-feature of humankind’s modern condition—a price we need to pay for, among other things, the role that the word ‘experience,’ as a synonymous with ‘experiment,’ played in the foundational event of modern knowledge, the Scientific Revolution (Wootton 2016, pp. 51–54, 72–73, 81, 104, 312, 319, 347, 417; see also Tagliapietra 2017, p. 138).³⁵ Arguably, though, comparative law will never

³⁴ As Cassirer (1944, p. 228) put it, ‘[i]n the objective content of science [the] individual features are forgotten and effaced, for one of the principal aims of scientific thought is the elimination of all personal and anthropomorphic elements.’ Cf. Polanyi (2015).

³⁵ Cf. Legrand’s use of the terms ‘experience’ and ‘experiment,’ above, Section 2. It could be argued that this trend has reached its apex with Popper (2002a, p. 249), for whom ‘experience in science is after all no more than

reach its much-awaited ‘maturity’ (Örücü 2007, p. 44) if the ‘experience-knowledge’ antithesis is not placed at the centre of scholarly discussions over its theory and practice.

References

- **Adorno T and Horkheimer M** [1947] (2007) *Dialectic of Enlightenment*, New York: Verso.
- **Agamben G** [1978] (2007) An essay on the destruction of experience. In Agamben G, *Infancy and History*, trans. Liz Heron. New York: Verso, pp. 15–72.
- **Andersen H and Hepburn B** (2015) Scientific method. In *Stanford Encyclopedia of Philosophy*. Available at <https://plato.stanford.edu/entries/scientific-method/> (accessed 28 July 2018).
- **Arendt H** [1958] (2008) *The Human Condition*. Chicago: University of Chicago Press.
- **Baert P** (2005) *Philosophy of the Social Sciences: Towards Pragmatism*. New York: Polity Press.
- **Berman HJ.** (1983) *Law and Revolution. The Formation of the Western Legal Tradition*. Cambridge (MA): Harvard University Press.
- **Bronstein D** (2016) *Aristotle on Knowledge and Learning. The Posterior Analytics*, Oxford: Oxford University Press.
- **Cashin Ritaine E** (2008) Introduction. In Cashin Ritaine E, Franck L and Lalani S (eds), *Legal Engineering and Comparative Law / L'ingénierie juridique et le droit compare*, Tome I. Zürich: Schulthess, pp. 9–25.
- **Cassirer E** (1944) *An Essay on Man*. New Haven: Yale University Press.

extension of ordinary everyday experience’. See also *ibid.* pp. 37, 260–261, 420–421; (2002b), pp. 16–26, 88–

91.

- **Cassirer E** [1923] (1955) *The Philosophy of Symbolic Forms*, Vol. I., trans. Ralph Manheim, New Haven: Yale University Press.
- **Colli G** (1979) *Filosofia dell'Espressione*, Milan: Adelphi.
- **De Cornick J** (2012) Comparisons in private patrimonial law: towards a bottom-up approach using (cross-cultural) behavioural economics. In Adams M and Bomhoff J (eds), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press, pp. 258–278.
- **Dedek H** (2017) What We Write About When We Write About Comparative Law: Pierre Legrand's Critique in Discussion: Preface. *The American Journal of Comparative Law* **65**, Special Issue ix–x.
- **Duke G** (2019) *Aristotle and Law. The Politics of Nomos*, Cambridge: Cambridge University Press.
- **Errera A** (2007) The role of logic in the legal Science of the glossators and commentators. Distinction, dialectical syllogism, and apodictic syllogism: an investigation into the epistemological roots of legal science in the late middle ages. In A. Padovani A and Stein P.G. (eds), *The Jurists' Philosophy of Law from Rome to the Seventeenth Century*, Dordrecht: Springer, pp. 79–156.
- **Gadamer H-G** [1960] (2013) *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall, New York: Routledge.
- **Hall J** (1963) *Comparative Law and Social Theory*, Baton Rouge: Louisiana State University Press.
- **Heidegger M** [1967] (2008a) What is Metaphysics? In Farrell Krell D (ed), *Basic Writing*. London: Harper, pp. 93–110.
- **Heidegger M** [1947] (2008b) Letter on Humanism. In Farrell Krell D (ed), *Basic Writings*. London: Harper, pp. 217–265.

- **Heidegger M** [2009] (2013) *The Event*, trans. Richard Rojcewicz. Indianapolis: Indiana University Press.
- **Heidegger M** ([1953] 2014) *Introduction to Metaphysics*, trans. and eds. Gregory Fried and Richard Polt. New Haven: Yale University Press.
- **Husa J** (2011) Comparative law, legal linguistics and methodology of legal doctrine. In Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* Oxford: Hart Publishing, pp. 209–228.
- **Husa J** (2015) *A New Introduction to Comparative Law*. Oxford: Hart Publishing,
- **Frankenberg G** (2016) *Comparative Law as Critique*. Cheltenham: Edward Elgar Publishing.
- **Gilson É** [1937] (1964) *The Unity of Philosophical Experience. The Medieval Experiment, the Cartesian Experiment, the Modern Experiment*, San Francisco: Ignatius Press.
- **Gordley J** (2013) *The Jurists. A Critical History*. Oxford: Oxford University Press.
- **Gordley J** (2017) Comparison, law, and culture: a response to Pierre Legrand. *The American Journal of Comparative Law* **65**, Special Issue 133–180.
- **Gutteridge H.C.** (1953) *Comparative Law*. Cambridge: Cambridge University Press.
- Margolis, E and Laurens, S (2011) Concepts. In *Stanford Encyclopedia of Philosophy*, <https://plato.stanford.edu/entries/concepts/> (last accessed: 28 July 2018).
- **Meuwese A and Versteeg M** (2012) Quantitative methods for comparative constitutional law. In Adams M and Bomhoff J (eds), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press, pp. 230–257.
- **Nelken D** (2016) From Pains-taking to Pains-giving Comparisons *International Journal of Law in Context* **12**, 390–403.
- **Jaeger W** [1943, 1971] (1986a) *Paideia: The Ideals of Greek Culture, Volume II. In Search of the Divine Centre*, trans. Gilbert Highet, Oxford: Oxford University Press.

- **Jaeger W** [1944, 1971] (1986b) *Paideia: The Ideals of Greek Culture, Volume III. Archaic Greece: The Mind of Athens*, trans. Gilbert Highet, Oxford: Oxford University Press.
- **Legrand P** (1988) Beyond method: comparative law as a perspective. *The American Journal of Comparative Law* **36**, 788–798.
- **Legrand P** (1995) Comparative legal studies and commitment to theory. *Modern Law Review* **58**, 262–273.
- **Legrand P** (1996) European legal systems are not converging. *The International and Comparative Law Quarterly* **45**, 52–81.
- **Legrand P** (1997) The impossibility of ‘legal transplants’. *Maastricht Journal of International and Comparative Law* **4**, 111–124.
- **Legrand P** (2001) What is ‘legal transplant’?. In Nelken D, Feest J and Hunter R (eds), *Adapting Legal Cultures*. Oxford: Hart Publishing, pp. 55–70.
- **Legrand P** (2002) Alterity: about rules, for example. In Birks P and Pretto A (eds), *Themes in Comparative Law: In Honour of Bernard Rudden*. Oxford: Oxford University Press, pp. 21–33.
- **Legrand P** (2003) The same and the different. In Legrand P and Munday R (eds), *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press, pp. 240–312.
- **Legrand P** (2005) Paradoxically, Derrida: for a comparative legal studies. *Cardozo Law Review* **27**, 631–654.
- **Legrand P** (2006) Comparative legal studies and the matter of authenticity. *The Journal of Comparative Law* **1**, 365–460.
- **Legrand P** (2007) Comparative law. In Clark D (ed) *S Encyclopaedia of Law and Society*. Los Angeles: Sage, pp. 220–223.

- **Legrand P** (2009a) *Le droit compare*. Paris: Presses Universitaires de France
- **Legrand P** (2009b) *Au lieu de soi*. In Legrand P (ed), *Comparer les droits, résolument*, pp. 11–37.
- **Legrand P** (2011) Foreign law: understanding understanding. *The Journal of Comparative Law* **6**, 67–177.
- **Legrand P** (2015) Negative comparative law. *The Journal of Comparative Law* **10**, 405–454.
- **Legrand P** (2017) Jameses at play. A tractation on the comparisons of laws. *The American Journal of Comparative Law* **65**, Special Issue 1–132.
- **Legrand P** (2018) Foreign law as self-fashioning. *The Journal of Comparative Law* **12**, 6–44.
- **Legrand P** (2019) What is that, to read foreign law?. *The Journal of Comparative Law* **14**, 290–310.
- **Nagel J** (2014) *Knowledge: A Very Short Introduction*, Oxford: Oxford University Press.
- **Örücü E** (2004) *The Enigma of Comparative Law. Variations on a Theme for the Twenty-first Century*. Leiden: Martinus Nijhoff Publishers.
- **Örücü E** (2007) Developing comparative law. In Örücü E and Nelken D (eds), *Comparative Law: A Handbook*. Oxford: Hart Publishing, pp. 43–65.
- **Padoa Schioppa A** (2007) *Storia del Diritto in Europa. Dal Medioevo all'Età Contemporanea*. Bologna: ilMulino.
- **Pavlakos G** (2007) *Our Knowledge of the Law*. Oxford: Hart Publishing.
- **Polanyi M** ([1958] 2015) *Personal Knowledge. Towards a Post-critical Philosophy*, Chicago: The University of Chicago Press.
- **Popper K** [1963] (2002a) *Conjectures and Refutations*. London: Routledge.
- **Popper K** [1938] (2002b) *The Logic of Scientific Discovery*. London: Routledge.

- **Raz J** (2009) *Between Authority and Interpretation*. Oxford: Oxford University Press.
- **Reimann M** (2002) The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century. *The American Journal of Comparative Law* **50**, 671–700.
- **Reimann M** (2012) Comparative Law and Neighbouring Disciplines. In Bussani M and Mattei U (eds), *The Cambridge Companion to Comparative Law*. Cambridge: Cambridge University Press, pp. 13–34.
- **Riles A** (2006) Comparative Law and Socio-legal Studies. *The Oxford Handbook of Comparative Law* in eds. Matthias Reimann and Reinhard Zimmermann. Oxford: Oxford University Press, pp. 775–813.
- **Rosen L** (2003) Beyond compare. In Legrand P and Munday R (eds), *Comparative Legal Studies: Traditions and Transitions*. Cambridge: Cambridge University Press, pp. 493–510.
- **Sacco R** (1991) *La comparaison juridique au service de la connaissance du droit*. Paris: Economica.
- **Samuel G** (2002) Comparative law and the legal mind. In Birks P and Pretto A (eds), *Themes in Comparative Law: In Honour of Bernard Rudden*. Oxford: Oxford University Press, pp. 35–47.
- **Samuel G** (2004) Epistemology and comparative law: contributions from the sciences and social sciences. In Van Hoecke M (ed), *Epistemology and Methodology of Comparative Law*. Oxford: Hart Publishing, pp. 35–78.
- **Samuel G** (2008) Is law really a social science? A view from comparative law. *The Cambridge Law Journal* **67**, 288–321.
- **Samuel G** (2014) *An Introduction to Comparative Law and Method*. Oxford: Hart Publishing.

- **Schauer F** (2012) Comparative constitutional compliance: notes towards a research agenda. In Adams M and Bomhoff J (eds), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press, pp. 212–229.
- **Severino E** (1989) *Il Giogo. Alle Origini della Ragione: Eschilo*. Milan: Adelphi.
- **Siliquini-Cinelli L** (2018) Vilhelm Lundstedt's 'legal machinery' and the demise of juristic practice, **29**, *Law and Critique*, 241–264.
- **Siliquini-Cinelli L** (2019) Legal positivism as *Tekhnē*: postnational normative ontology and the positivist effectual temporality. In Siliquini-Cinelli L (ed), *Legal Positivism in a Global and Transnational Age*, Dordrecht: Springer, pp. 123–154.
- **Siliquini-Cinelli L** (2020) On the Prometheus legacy: Glenn's pluralist logics, Melandri's analogy, and legal plurality's 'ontological register', **15**, *The Journal of Comparative Law*, 94–132.
- **Siems M** (2018) *Comparative Law*, 2nd edn. Cambridge: Cambridge University Press.
- **Sartori G** (2011) *Logica, Metodo e Linguaggio delle Scienze Sociali*. Bologna: ilMulino.
- **Tagliapietra A** (2017) *Esperienza. Filosofia e Storia di Un'idea*, Milan: Raffaello Cortina Editore.
- **Tamanaha Brian Z.** (2000) A non-essentialist version of legal pluralism. *Journal of Law and Society* **27**, 296–321.
- **Tamanaha Brian Z.** (2001a) *A General Jurisprudence of Law and Society*. Cambridge: Cambridge University Press.
- **Tamanaha Brian Z.** (2001b) Socio-legal positivism and a general jurisprudence. *Oxford Journal of Legal Studies* **21**, 1–32.
- **Tamanaha Brian Z.** (2017) *A Realistic Theory of Law*. Cambridge: Cambridge University Press.

- **Twining W** (2005) Social science and the diffusion of law. *Journal of Law and Society* **32**, 203–240.
- **Twining W** (2009) *General Jurisprudence. Understanding Law from a Global Perspective*. Cambridge: Cambridge University Press.
- **Valcke C** (2009) “‘Droit’: réflexions sur une définition aux fins de comparaison’. In Legrand P (ed), *Comparer les droits, résolument*. Paris: Presses Universitaires de France, pp. 99–121.
- **Van Hoecke M** (2015) Methodology of comparative legal research. *Law and Method* **12**, pp. 1–35.
- **Werro F** (2017) What We Write About When We Write About Comparative Law: Pierre Legrand’s Critique in Discussion: Preface. *The American Journal of Comparative Law* **65**, Special Issue: vi–viii.
- **Wootton D** [2015] (2016) *The Invention of Science. A New History of the Scientific Revolution*. London: Allen Lane.
- **Yntema Hessel E** (1958) Comparative Law and Humanism. *The American Journal of Comparative Law* **7**, 493–499.
- **Zweigert K and Kötz H** [1969] (1998) *An Introduction to Comparative Law*, 3rd edn. Cambridge: Cambridge University Press.
- **Zumbansen P** (2012) Transnational comparisons: theory and practice of comparative law as a critique of global governance. In Adams M and Bomhoff J (eds), *Practice and Theory in Comparative Law*. Cambridge: Cambridge University Press, pp. 186–211.